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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

GARY STENBACH,

Appellant,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
CHARLES and SUELLEN SHAW;**

Respondents.

PCHB NO. 93-144

**FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER**

The Pollution Control Hearings Board ("Board") heard this matter on May 3, 1994, in its hearing room in Lacey, Washington. The Board consisted of: Robert V. Jensen, presiding; Richard C. Kelley, and James A. Tupper, Jr.

Randi R. Hamilton of Gene Barker and Associates, Inc. of Olympia, recorded the proceedings.

Gary Stenbach ("Stenbach") represented himself. The Department of Ecology ("Ecology") was represented by Mark Jobson, Assistant Attorney General. Charles and Suellen Shaw ("Shaws") represented themselves.

The Board heard sworn testimony, reviewed exhibits and listened to closing arguments. Based thereon, the Board renders these:

FINDINGS OF FACT

I

Marjorie Sibbel and her husband, the aunt and uncle of Suellen Shaw, in the 1950's, purchased acreage lying approximately 1.5 miles east of Orting, Washington. They never

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2 lived on the property, but rather intended it for their retirement. There is a natural spring on
3 the property.

4 II

5 To the west of the spring, on the Sibbel's property, was a pond which had been built
6 by the previous owners in 1928. Mrs. Sibbel applied for a surface water right after the
7 Paynes, and obtained a right to withdraw .06 cubic feet per second, for group domestic
8 supply. The priority date of that right is August 13, 1978.

9 III

10 Mrs. Sibbel sold the westerly five acre parcel to Mr. and Mrs. Payne in 1975. Mr.
11 Payne applied for a water right from Ecology. He ultimately obtained a right to an
12 instantaneous diversion of .1 cubic feet per second, from an unnamed spring (stream). The
13 priority date of that right, December 8, 1977, makes it the senior right to the waters emanating
14 from the spring. The point of diversion was located on the easterly edge of his property,
15 where a stream, which resulted from the overflow of the spring on the Sibbel's property,
16 entered his property from the east. The Payne's annual right was seven acre-feet. The
17 beneficial uses for that right are: group domestic supply, stockwater, irrigation of two acres,
18 fish propagation and fire protection. The domestic supply was limited to three-acre feet per
19 year; the irrigation to four acre-feet per year, applied from May 1 to October 1 every year.
20 The group domestic supply and the fish propagation withdrawal rights were continuous.

21 IV

22 A depression existed on the Payne property, which Mr. Payne enlarged into a pond,
23 feeding the pond with water from the stream flowing from the spring. Mr. Payne dug
24 through the dike around the Sibbel's pond in 1970 to lay a water line. Aerial photographs from
25 1988 and 1991, and a diagram attached to the Payne's original easement for their water line,
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2 depict a meandering, stream course from the vicinity of the spring to the Payne's property.
3 The Shaws had a surveyor prepare, in June 1987, a survey map which depicted both a stream
4 emanating from the spring, and a stream coming from the southwest of the spring, which
5 streams joined on the Payne property and flowed west. We find the stream depicted on the
6 aerial photographs to be a natural water course. The stream bed was two and one-half to 3
7 feet wide. This water course was created by the abundance of water emanating from the
8 spring. This flow from the spring also created a swampy area along the course of the spring.

9 V

10 The Shaws bought the Sibbel property in 1986 from Mrs. Shaw's aunt. At some point
11 they enclosed the spring into a vertically positioned concrete culvert. In 1987, the Shaws
12 applied for a surface water right, in the amount of .09 cubic feet per second. The right was
13 originally requested for domestic supply to three residences, irrigation, stockwatering,
14 recreation, fish propagation and beautification purposes. This application was given a priority
15 date of February 20, 1987. The Shaws later dropped the application for water to serve three
16 residences. The Shaws also applied for another right in April 1987, to serve nine residences.
17 The Shaws subsequently cancelled this application, because the residential development project
18 had been abandoned.

19 VI

20 The Shaw's application is junior to the Payne's right and three other rights to the
21 spring. These rights total .195 cubic feet per second of instantaneous flow. The flow of the
22 spring is estimated to be between .25 and .4 cubic feet per second.
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2 VII

3 The Shaws have built two additional ponds, which are located about 50 feet north of
4 the spring. These ponds are fed by an underground pipe from the spring. They are
5 interconnected by a weir. Overflow from the ponds flows in a sheet into grassy swales.

6 VIII

7 The Paynes obtained a revised easement for their water line from the spring in 1989.
8 This provided them a two inch line connected to the spring and buried at least two feet
9 underground.

10 IX

11 Stenbach first visited the Payne's property in February 1992. He purchased the
12 property in November 1992. He grazes llamas on the property. In September of that year, on
13 one of his visits to the property, he observed that Mr. Shaw had filled in the meandering
14 stream so that it no longer ran onto the Payne property. The Shaws had obtained a grading
15 permit from Pierce County to do level out their property, in order to plant pasture seed.

16 X

17 Stenbach also discovered, after he purchased the property, that his water line was no
18 longer working. He asked Ecology to intercede, which it did in May 1993. The water line
19 works, but now flows at about four gallons per minute, which is less than .01 cubic feet per
20 second. If allowed to flow throughout the year, this flow would yield Stenbach about 6.45
21 acre-feet of water.

22 XI

23 The pond on the Stenbach property is about 300 feet in length by about 175 feet in
24 width. It is 8 to 9 feet deep. Historically, it remained full throughout the year. The pond
25 went dry in the summer of 1993, and has since filled up to about one-half of its original level.

1
2 **XII**

3 The Shaws raise sheep on their property. They manage around 300 head. The water
4 demand for sheep is between two and three gallons per day.

5 **XIII**

6 The Shaws intend to use the two ponds they have constructed for fish propagation. Use
7 of the ponds for this purpose could adversely affect the quality of the water leaving the ponds.

8 **XIV**

9 There is adequate water from the spring to serve all the certificated water rights, as
10 well as the application of the Shaws.

11 **XV**

12 Ecology originally investigated the application on August 24, 1987. Ecology put a
13 hold on the investigation, pending resolution of a lawsuit between the Paynes and the Shaws
14 over the water line easement. No evidence was presented at the hearing concerning the results
15 of this early investigation. Ecology did not investigate the Shaw's property again, until after
16 the flow from the spring to the stream had been closed and the stream bed between the Payne
17 and Shaw properties filled. Ecology was apparently unaware of and did not investigate the
18 interference by the Shaws with the Payne's point of diversion from the stream. Ecology
19 reviewed the application and on June 14, 1993, issued its Report of Examination,
20 recommending issuance of a permit to allow the appropriation of .09 cubic feet per second
21 from the spring.

22 **XVI**

23 Ecology recommended allocating one acre-foot per year of water to the Shaws for
24 stockwatering purposes.

1
2 **XVII**

3 Ecology recommended allocating 20 acre-feet per year of water to the Shaws for
4 irrigation of 20 acres of pasture land. The irrigation right was limited to the period between
5 May 1 and October 1 each year.

6 **XVIII**

7 Ecology noted in its Report of Examination that the project had already started before
8 Ecology issued its report. Ecology set September 1, 1994, as the completion date of the
9 project; and September 1, 1995, as the deadline for putting the water to beneficial use.

10 **XIX**

11 Ecology determined that the remaining beneficial uses proposed by the Shaws are non-
12 consumptive.

13 **XX**

14 Stenbach appealed Ecology's Report of Examination to the Board on July 14, 1994.
15 The appeal challenged the following conclusions in the report:

- 16 1. that the appellant's property has been abandoned;
17 2. that the Shaw's withdrawal of water will not affect existing rights;
18 3. that water is needed to stockwater 300 sheep; and
19 4. that the water rights of adjacent property owners were not being exercised to the
20 best of the applicant's knowledge.

21 **XXI**

22 Any conclusion of law deemed a finding of fact is hereby adopted as such. From these
23 findings of fact, the Board makes the following:
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2 **CONCLUSIONS OF LAW**

3 **I**

4 The Board has jurisdiction over these parties and the subject matter. RCW
5 43.21B.110(1)(f).

6 **II**

7 RCW 90.03.250 establishes the basic requirement that any person seeking to
8 appropriate water for a beneficial use, must apply to Ecology for a permit. No waters are to
9 be diverted for the proposed uses, until the permit has been obtained. Id.

10 **III**

11 Stenbach did not raise the issue that the Shaws had prematurely diverted waters from
12 the spring without an Ecology permit. This Board has the authority to raise an issue essential
13 to do justice in a particular case. We use this authority sparingly. Here, it appears that the
14 Shaw's work essentially eliminated Stenbach's point of diversion, without the benefit of a
15 permit. This is a fundamental invasion of Stenbach's right.

16 **IV**

17 RCW 90.03.290 requires Ecology to investigate the application, and enter "written
18 findings of fact of all things investigated." Id. This was done.

19 **V**

20 Before Ecology can grant a water permit, it must determine whether: 1) there is
21 available water for the proposed uses; 2) the uses are beneficial; 3) the proposed use will not
22 impair existing rights; and 4) the proposed use will not be detrimental to the public welfare.
23 RCW 90.03.290.

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2 **VI**

3 We conclude that approval of the Shaw's application impairs Stenbach's water right.
4 That right, which is senior to all others to this source of water, contains a point of diversion
5 which places it on the meandering stream that flowed onto the Payne property from the spring
6 on the Shaw's property. That stream was eliminated by the Shaws in the work they did on the
7 land, in relation to their water right application.

8 **VII**

9 Stenbach is entitled to .1 cubic feet per second, instantaneous flow, where the stream
10 previously entered his property. The instantaneous flow he now gets from the pipe connected
11 to the spring is 10 percent of that guaranteed by his water right. We recognize that Stenbach's
12 right is limited to an annual quantity of seven acre-feet per year. He is not entitled to more
13 than that.

14 **VIII**

15 Our conclusion is buttressed by RCW 90.54.020(3)(a), which subjects all water rights
16 to the following principle:

17 (3) The quality of the natural environment shall be protected and, where possible,
18 enhanced as follows:

19 (a) Perennial rivers and streams of the state shall be retained with base flows necessary
20 to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental
21 values and navigational values. Lakes and ponds shall be retained in substantially in
22 their natural condition. Withdrawal of water which would conflict therewith shall be
23 authorized only in those situations where it is clear that overriding considerations of the
24 public interest will be served.

25 **IX**

26 This historic drainage from the spring has been eliminated. Although it was small, the
27 stream was historically fed by the spring. It was an aesthetic amenity to both the Shaw and
Payne properties. Because there is an abundance of water, replacement of the stream will not

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2 adversely affect existing rights. Ecology believes and we concur that there is enough water to
3 also satisfy the application of the Shaws.

4 X

5 We need not address the other issues raised by Stenbach, in light of our conclusion on
6 this issue.

7 XI

8 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From
9 the foregoing, the Board issues this:

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2 **ORDER**

3 Ecology's Report of Examination is affirmed, provided that it is conditioned to require
4 the Shaws to restore the natural stream bed and flow from the spring to the Stenbach property,
5 as such bed and flow existed at the time Stenbach's predecessor, the Paynes, received a
6 certificated water right. The restored stream shall provide Stenbach with no less than .1 cubic
7 feet per second of instantaneous flow throughout the year. This restoration shall be
8 accomplished before the Shaws are entitled to a water right certificate for the amount of
9 withdrawal recommended by Ecology in its report.

10 DONE this 12th day of May, 1994

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12 **POLLUTION CONTROL HEARINGS BOARD**

13 
14 ROBERT V. JENSEN, Presiding Officer

15 
16 RICHARD C. KELLEY, Member

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18 JAMES A. TUPPER, JR., Member

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